APPENDIX.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Samuel A. Miller, as Trustee in Bankruptcy of the estate of John Barrymoore, Bankrupt, appellant, vs. Roland Rich Woolley, appellee.

No. 10,460.

Mar. 20, 1944.

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: Wilbur, Mathews and Stephens, Circuit Judges.

WILBUR, Circuit Judge:

This is an appeal from an order of the United States District Court reversing an order of the referee in bankruptcy which required the appellee to pay to the trustee in bankruptcy the sum of $5,950[1] which had been paid to appellee by John Barrymore as a part of the fee in a divorce case instituted by John Barrymoore while a proceeding for an arrangement between Barrymore and his creditors, under chapter 11 of the Bankruptcy Act, was in progress. Concurrently with the filing of his petition for arrangement, under 11 U. S. C. A. § 722, on June 5, 1940, the debtor, John Barrymore, filed a petition stating that he was earning $5,000 per week in his profession as an actor; that it had been his practice to expend approximately $1,000 per week for his "household and necessary ex-

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[1]The appellee has $619.65 additional in his hands which he consented to turn over to the trustee, and it was so ordered.

penses" and asked the court to "fix his drawing account from his earnings" and alleged that a reasonable drawing account pending a further order of court "as and for his living expenses herein and for his services herein should be and is the sum of $1,000 per week." The petition prayed that an order be made "fixing his drawing account for his household expenses and necessities at the sum of $1,000 per week, subject to the further order of this court." The order of the referee made on the same date ordered "that the drawing account of said debtor be and the same is hereby fixed in the sum of $1,000 per week, subject to the further order of this court."

During the pendency of the proceedings there were numerous meetings of the creditors before the referee. During these proceedings the disposition of the $1,000 per week paid the debtor was discussed.

On September 20, 1940, the debtor entered into a written contract wherein he agreed to pay to appellee Roland Rich Woolley the sum of $10,000 as a fee in a divorce suit to be instituted on his behalf by Mr. Woolley. On September 30th appellee Woolley and Hiram E. Casey were substituted as attorneys for the debtor in the arrangement proceeding. It should be observed that at the time the allowance of $1,000 per week was made by the court and at the time the contract for employment of appellee as an attorney in the divorce action was made the debtor was represented in the arrangement proceedings by other lawyers. So far as the representations are concerned which were made by the debtor to the referee in procuring the allowance in June, 1940, the appellee Woolley had no connection therewith nor responsibility therefor. Under the agreement made by Mr. Woolley with the debtor the allowance of $1,000 per week repaid to the debtor by the receiver in the arrangement proceedings was turned over

to appellee Woolley when received and disbursed by him on behalf of the debtor to pay expenses, each disbursement being approved by the debtor. Appellee had retained on account of his services to the debtor in the divorce case the sum of $5,950. The retention of these amounts was approved by the debtor.

The theory upon which the referee ordered appellee Woolley to pay over to the trustee in bankruptcy[2] the sum of $5,950 was that the weekly allowance to the debtor would not have been continued at so high a figure if the appellee had not concealed the fact that he was being paid attorney fees from the allowance. The trial court, upon review, considered and held that the money paid to the debtor as an allowance belonged to him and that the debtor's estate in the arrangement proceedings had no concern with the disposition the debtor made of the allowance.

Before proceeding further it should be stated that the law concerning arrangements (ch. 11, Bankruptcy Act) makes no provision for the payment of moneys to a debtor by way of allowances for living expenses. The power of the bankrutcy court in arrangement proceedings over the future earnings of the debtor is entirely dependent upon the arrangement proposed by the debtor in his petition for confirmation of the arrangement. The basic question then is, what was the arrangement proposed by the debtor and to what extent did the debtor yield jurisdiction over his future earnings. To determine this matter will involve

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[2]The debtor was declared a bankrupt after his death because the cessation of his earnings made it impossible to carry out the arrangement. 11 U.S.C.A. § 777.

some consideration of the proceedings before the bankruptcy court which we will state as briefly as may be.

The debtor owed the United States government $25,000 income tax for his fiscal year 1938, together with interest and penalties due to the default in payment. He owed over $5,000 for income taxes to the state of California. He owed large amounts of delinquent taxes to the county of Los Angeles. He also owed some preferred debts to laborers and others to general creditors. His assets were heavily encumbered with little prospect of any recovery therefrom for the benefit of general creditors. The only substantial source of payment of these obligations was money derived by the debtor from his current earnings which he estimated in his petition to be over $250,000 per annum. These earnings, as soon as realized, were subject to the lien of the United States government for the income taxes of 1938, amounting to about $30,000, and also gave rise to additional income taxes for the current year of 1940 for about the same amount as estimated,[3] and to California state income taxes, amounting to about one-fifth of the federal income taxes.

In his petition for the arrangement the debtor enumerated his property and his obligations and offered an arrangement to pay into court each week the sum of $1500 to be devoted to the payment of his general creditors, such payments to be continued until the creditors were paid in full. He also offered to pay all outstanding taxes. The claims for these taxes were preferred claims and were secured by tax liens upon all the property of the debtor.

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[3]The 1939 income taxes had been paid before debtor's petition was filed in the arrangement proceedings.

The debtor did not state how nor in what manner he would pay these taxes, but it is fairly to be inferred from his attitude at the time he secured his allowance of $1,000 per week from the court that he intended to pay into the court all his earnings, alleged to be $5,000 per week, and to have returned to him the sum of $1,000 per week. It is reasonable to say that his proposal as made in his petition for the arrangement contemplated the payment to the receiver of his estate of all his wages on condition that he be repaid the sum of $1,000 per week.

As to the amounts which were to be paid for taxes, the federal and state governments were interested in the proceedings although the court had no authority over these preferred claims except to see that their priorities were preserved.[4] The general creditors were interested in the

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[4]11 U.S.C.A. § 707. Creditors; debts; claims. Unless inconsistent with the context and for the purposes of an arrangement providing for an extension of time for payment of debts in full and applicable exclusively to the debts to be extended—

(1) "creditors shall include the holders of all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under section 103 of this title and whether liquidated or unliquidated, fixed or contingent; and

(2) "debts" or "claims" shall include all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under section 103 of this title and whether liquidated or unliquidated, fixed or contingent.

11 U. S. C. A. § 756. Modification of rights of unsecured creditors. An arrangement within the meaning of this chapter shall include provisions modifying or altering the rights of unsecured creditors generally or of some class of them, upon any terms or for any consideration.

11 U. S. C. A. § 771. Discharge of unsecured debts upon confirmation. The confirmation of an arrangement shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order confirming the arrangement, including the claims specified in section 754 of this title, but excluding such debts as, under section 35 of this title, are not dischargeable.

discharge of these overriding liens. The unsecured claims had no right to payment from current or future earnings of the debtor.[5] It is to say that the arrangement tendered by the debtor, as qualified by the accompanying petition for an allowance of $1,000 per week from his future earnings was one in effect to pay over to the receiver all his earnings except $1,000 per week, although his proposed "arrangement" was to pay only $1,500 per week, from which he requested his allowance of $1,000 per week. To state it somewhat differently, it was a proposal to retain $1,000 per week and to pay $500 per week to the receiver for the general creditors, and the balance of the debtor's earnings to go to pay his obligations to the state and federal governments and other secured or preferred claims.

No creditor questioned the right of the debtor to retain the moneys paid to him weekly by way of an allowance, but during the progress of the proceedings it was suggested by some of the creditors to the referee and also by the referee that perhaps this amount was too large, and inquiries were made as to the disposition and need of it, but these inquiries were directed largely to the question of the acceptance by the creditors of the proposed arrangement and the three amendments to the arrangement

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[5]11 U. S. C. A. § 752. Rights, duties and liabilities of creditors, etc. Where not inconsistent with the provisions of this chapter, the rights, duties and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same, * * * where a petition is filed under section 722 of this title, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed.

In re Leibowitt, 93 F. 2d 333, 335. Wages of a bankrupt after adjudication are not subject to claims of the estate.

originally proposed. During this period negotiations were carried on in open court between the creditors and the debtor's attorneys and the United States government concerning the acceptance of the proposed arrangements as modified from time to time by the debtor to meet the objections of the creditors. It was not until June 19, 1941, slightly more than a year after the original petition was filed and after the debtor had paid the receiver over $100,000 from his earnings in anticipation of the acceptance of his plan or arrangement by his creditors and confirmation by the court, that the third amended proposed arrangement was consented to and confirmed by the court. No accounting was made or required by the court as to the sum returned to the debtor by the receiver under order of court; the confirmation dealt only with the money in the hands of the receiver and with the debtor's future earnings.

The first amended proposed arrangement, filed February 7, 1941, provided that "all earnings of the debtor * * * earned and payable after the adoption and approval of this plan" subject to certain deductions specified should be paid to the custodian or disbursing agent. It was proposed by the debtor that from his earnings a weekly sum of $600 be paid to the debtor and that an additional sum of $400 per week be placed in a reserve fund to be paid to the debtor if and when his earnings were insufficient to pay him the $600 per week. It was stated: "It is the intention and purpose to provide petitioner with $600.00 per week for his personal living expenses so long as he may either earn said amount or there shall be in said special reserve fund an amount sufficient to permit the payment of the said $600.00 per week to your petitioner."

On March 18, 1941, an amendment to the amended proposition of the debtor was filed. This also provided for the payment of $600 per week to the debtor, $200 per week for his children, and $400 per week to be paid into the reserve fund. Payments in the reserve fund were to continue until the amount in the reserve was equal to $7500. Subsequent payments were to be limited to the amounts necessary to continue the reserve at $7500. The amendment to the first amended proposition for the arrangement made March 18, 1941, eliminated the provisions with reference to "his personal living expenses" and provided directly for the payment of $600 per week to the debtor and $400 per week in the reserve fund without any statement that the weekly payments were for living expenses. The next day, March 19, 1941, the referee made an order directing that $600 per week be paid to the debtor in place of any amount theretofore paid to him on account of his personal expenses. Three hundred dollars per week was ordered paid into a special fund "to be earmarked as a reserve account to be used for such purposes as the court may hereinafter direct by a further order."

The second amended proposition, filed April 9, 1941, provided for the payment to the debtor of the sum of $700 per week, $200 a week additional to support debtor's children, and $400 per week to be paid into the reserve fund. Nothing is said as to the purpose for which this money is to be paid to the debtor except that in the proposed amended arrangement it is stated that "heretofore the referee herein fixed the sum of $1,009.00 per week as a reasonable amount for the support and maintenance of petitioner"; that the amount had thereafter been reduced to $900, and later to $600, plus a reserve of $300 per week.

In the meantime the receiver filed reports and accounts showing that he had received altogether from the earnings of the debtor during the pendency of the proposed arrangement $106,536.18, and that he had disbursed $72,254.97, leaving the balance on hand, $34,281.21. On May 17, 1941, an order was made substituting other attorneys for the debtor in the place of the appellee and Hiram Casey.

On June 19, 1941, an order was made approving, with modifications, the plan of arrangement as embodied in the second amended proposition, and providing that all future earnings of the debtor should be paid into a general fund and disposed of in accordance with the provisions of the order of confirmation and providing for the payment to the debtor of the sum of $700 per week, the court reserving the right to modify the weekly payment for any reason. It provided for the payment of $200 a week for the maintenance of the debtor's children, for the payment of $400 per week into the reserve fund to be applied on the weekly payments to the debtor and his children or otherwise as the court might direct.

It will be observed that there was no argreement or obligation upon the part of the bankrupt to pay any money upon his proposed plan of arrangement until the confirmation of his plan of arrangement on June 19, 1941.

The earnings of the debtor, whether deposited with the court or retained by him, were subject to the tax lien of the federal government, aggregating over $25,000. All the moneys paid out by the referee from the funds were subject to the lien of the federal government in the hands of the payees or transferees if they took with actual or constructive knowledge of the lien. (26 U. S. C. A. §§

3670, 3672; see Investment and Securities Co. v. United States, decided by this court February 16, 1944.)

It was not until the federal government had received payments from the accumulated earnings of the debtor in full satisfaction of its claims that the moneys paid to the appellee and to others were finally relieved of the tax lien for the taxes of 1938.

Another factor to be considered is that the debtor died on May 29, 1942, before the arrangement confirmed on June 19, 1941, had been fully carried out; that on July 1, 1942, the deceased debtor was declared a bankrupt as permitted by 11 U. S. C. A. § 26. We need not discuss the effect of this adjudication of bankruptcy, which is not discussed in the briefs, further than to state that the bankruptcy adjudication by the terms of the statute related back to the filing of the original petition for the arrangement on June 5, 1940, and, consequently, the earnings of the debtor thereafter, that is, from June 5, 1940, to July 1, 1942, under bankruptcy proceedings belong to him subject only to liens for taxes and to the rights of attachment or garnishment by those having claims which cannot be discharged in bankrutpcy. The order of the referee requiring the appellee to pay $5,950 to the trustee in bankruptcy was made on September 25, 1942, nearly three months after the status of the bankrupt and the creditors had been changed by the adjudication in bankruptcy.

The proceedings which resulted in the order appealed from were initiated by the debtor on October 3, 1941. In this petition he alleged that he had agreed to pay the appellee $10,000 for his services as attorney at law in the divorce case which he was to institute for the debtor and

that the fee of $10,000 was to cover the petitioner's services in the arrangement proceedings in the bankruptcy court as well as in the divorce proceeding to be instituted and that the appellee had paid himself from the funds of the debtor without the approval or knowledge of the court. The debtor asked that the fee be reduced proportionately and the balance be returned to the petitioner or the receiver.

This petition was answered by appellee on October 17th. The appellee set out the written agreement between the parties which showed the fee did not include services in the arrangement proceedings. On October 27, 1941, the debtor amended his petition alleging that the contract with appellee for his services in the divorce matter was not approved by the court and that the court was not informed of the fact that moneys paid to the debtor "for his living expenses" were being applied to the payment of said attorney's fees. The appellant alleged that the various allowances made to him for his living expenses were made by the court upon the representation by appellee that the sums so allowed were necessary for petitioner's maintenance and that the fact that during said period of time appellee paid to himself out of said funds the sum of $6,900 was concealed from the court. The prayer was that the money be repaid to the receiver in the arrangement proceedings.

The receiver, after asking for instructions, intervened in the proceeding instituted by the debtor and the debtor's newly substituted attorneys notified the referee that in their opinion the fund of $5,950 should be ordered returned to the estate on the ground that the debtor's contract for the payment of the fees to the appellee was void

because not approved by the court and that in maintaining the high allowance granted to the debtor the court was not advised that part of the funds were being used to pay the attorney's fees of appellee.

The question as to whether or not a $10,000 fee in the divorce matter was exorbitant or whether the agreement therefor was obtained by fraudulent misrepresentations as to the amount of labor involved in the divorce case has been eliminated from the case, no allegations upon that subject being contained in the amended pleadings upon which the matter was tried. No evidence was introduced as to what would constitute a reasonable fee in the divorce case. It appears the debtor made the contract without questioning the reasonableness of the fee and only raised the question when the divorce was obtained without contest because of his default upon the cross-complaint of his wife. If the money paid to the appellee on behalf of the debtor was the debtor's own money to do with as he saw fit, as we believe and hold, the question of whether or not the continuance of the order making the so-called allowance to the debtor resulted from concealment of facts is immaterial, and there is no basis for requiring the repayment to the bankrupt estate of the moneys repaid to the debtor in the form of an allowance. It was his money both before and after the order. It is true that until an accounting was requested by the referee the appellee did not disclose to the court that he was being paid large amounts from such allowance for attorney's fees. No concealment was practiced except such as was involved in the failure of the attorney to advise the court that he was receiving this money. The statements of appellee that the moneys to be paid to the debtor were necessary for his

expenses were in most instances made in discussion of the proposed plan of arrangement and not with reference to the disposition of the money theretofore repaid to the debtor. Certain items of past expense were stated to the court with reference to servants, housekeeping expenses, etc., paid by the debtor, but in no instance did these amounts cover or purport to cover the entire allowance of $1,000 per week and in no instance did the court require a statement or the introduction of evidence on the subject of the disposition of the entire allowance until about August, 1941, when appellee filed a detailed statement showing, among other things, the payment of the $5,950 to him for attorney fees. While it is a matter of acute interest to the appellee, we deem it unnecessary to discuss the question of professional ethics as to how far an attorney, under such circumstances, is bound by his obligation to maintain the secrets of his client and how far he is bound by his obligation not to deceive the court. In any event there is no basis for the order requiring the appellee to refund moneys paid to him by the debtor from his own funds under a valid contract of employment.

As to the jurisdiction of the court to compel the appellee to repay money paid to him by the bankrupt, it is clear that if the money so paid to appellee belonged to the debtor, as we hold, the court had no jurisdiction to order it paid to the trustee in bankruptcy. The real contest is between the debtor and the appellee. The question as to whether the order of allowance in the arrangement proceedings did or could limit the debtor's use of the funds

allowed him if doubtful before the adjudication of bankruptcy is set at rest by a retroactive adjudication in bankruptcy which freed his earnings so far as the jurisdiction of the bankruptcy court is concerned from the claims of the bankruptcy court over his property.[6]

Order affirmed.

(Endorsed:) Opinion. Filed Mar. 20, 1944. Paul P. O'Brien, Clerk.

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[6]11 U. S. C. A. § 778. Procedure upon order directing that bankruptcy be proceeded with. Upon the entry of an order directing that bankruptcy be proceeded with— * * *

(2) in the case of a petition filed under section 722 of this title, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; and the trustee nominated by creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed as provided in section 72 of this title.

In re Leibowitt, 93 F. 2d 333, 335. Wages of a bankrupt after adjudication are not subject to claims of the estate.

Office - Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1943

No. 146

SAMUEL A. MILLER, as Trustee in Bankruptcy of the Estate of John Barrymore, Bankrupt,

Petitioner,

vs.

ROLAND RICH WOOLLEY,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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vs.

ROLAND RICH WOOLLEY,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

Statement of Case.

The petition of the petitioner for writ of certiorari sets forth the proceedings had before the Referee in Bankruptcy in a disconnected manner. We feel that in view of the issues raised in the petition, your Honorable Court would grasp the facts more readily if our answer to the petition presented the facts in the order of their occurrence before the Bankruptcy Court. We have, therefore, assembled the pertinent portions of the transcript of the record which have a bearing upon the issues raised by the petitioner. We will interpolate com-

ments on the facts as presented and such comments will be within brackets. (All italicized portions of the record are ours.)

On June 5, 1940, John Barrymore, now deceased, through his then attorneys, filed a Petition for Arrangement Under Chapter XI of the Bankruptcy Act. The pertinent portions of said petition are as follows:

"PETITION FOR ARRANGEMENT UNDER CHAPTER XI OF THE BANKRUPTCY ACT.

* * * * * * * *

"The petition of John Barrymore * * * by occupation actor, respectfully shows:

* * * * * * * *

"3. Your petitioner is unable to pay his debts as they mature and proposes the following arrangement with his unsecured creditors:

"a. To pay in full, as may hereafter be ordered by the Court upon confirmation of his plan of arrangement, all costs of administration herein.

"b. In the same manner and pursuant to an order of this Court upon the confirmation of his plan of arrangement, to pay all taxes in full due or owing to any taxing agency of the United States or State of California.

"c. To pay in full all wage claims and other debts having priority under the laws of the United States or the (2) laws of the State of California.

"d. To pay all of his unsecured creditors the full amount of their claims as finally approved and allowed, payable in the manner following, to-wit: In weekly payments of One Thousand, Five Hundred ($1,500.00) Dollars beginning thirty (30) days after the date of confirmation of your petitioner's plan of arrangement, and a like sum each and every week thereafter, *providing debtor is employed and engaged in his profession, until all of said unsecured creditors have been paid in full.*

* * * * * * * *

"5. The schedule hereto annexed, marked Exhiibit 'B' and verified by your petitioner's oath, in so far as it is possible to ascertain, contains an accurate inventory of all of his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

* * * * * * * *

"JOHN BARRYMORE
Petitioner.

JOSEPH SCOTT and
A. H. RISSE
JERRY GIESLER and
MEYER M. WILLNER
Attorneys for Debtor."

[Rec. pp. 2, 3 and 4.]

At the same time, by his then attorneys, Mr. Barrymore filed a petition containing the following allegations

and designated "Petition of Debtor to Fix His Compensation." Its pertinent provisions are as follows:

"PETITION OF DEBTOR TO FIX HIS COMPENSATION.

"The Petition of John Barrymore respectfully shows and represents:

I.

"That your Petitioner is a Debtor and is an Actor and is employed by the Twentieth Century Fox Studios.

II.

"That the *earnings* of your Debtor grosses approximately $5,000.00 per week; that your Petitioner has heretofore expended approximately $1,000.00 per week as *and for his household and necessary expenses;* that your Petitioner desires to have this Court, in accordance with its Orders heretofore made, *fix his drawing account from his earnings,* and in this respect your Petitioner alleges that he devotes all of his time, skill, and energy to his profession as an Actor.

III.

"Your Petitioner alleges *that a reasonable drawing account pending the further Order of this Court as and for his living expenses herein and for his services herein* should be and is the sum of $1,000.00 per week.

* * * * * * * * *

"JOHN BARRYMORE
Petitioner
"JOSEPH SCOTT & A. H. RISSE
JERRY GIESLER & MEYER M. WILLNER
"Attorneys for Petitioner.

(Duly Verified.)"

[Rec. pp. 112 and 113.]

(Comment: It will be noted from the foregoing that the Petition for Arrangement schedules an inventory of all of Barrymore's property, both real and personal, and makes an offer to pay

(a) All taxes due the United States or the State of California;

(b) To pay in full all wage claims;

(c) To pay all unsecured creditors.

(There are two classes of assets that Barrymore had under consideration, namely (1) all of his real and personal property owned by him as of the date of the filing of the petition, and (2) his future earnings which Barrymore stated grossed approximately $5,000 per week.

The petition of Barrymore to fix his compensation designates the $1,000.00 per week requested to be paid to him out of his future earnings as a fund to be used "for his household and necessary expenses" and as a "drawing account from his earnings", and Barrymore in the third paragraph of the petition to fix his compensation, requests that he be paid out of his future earnings "a reasonable drawing account pending the further order of this (Bankruptcy) Court as and for living expenses * * * and for his services", and states this sum should be $1,000.00 per week. It will be observed that the request of Barrymore is not for a payment out of the real and personal property owned by him at the date of the filing of the petition under Chapter XI, but is a sum to be paid to him out of future earnings.)

After the presentation of the petition under Chapter XI and the petition by Barrymore to fix his compensation, the Bankruptcy Court made the following order:

"ORDER FIXING COMPENSATION OF DEBTOR.

"Upon reading and considering the verified Petition of John Barrymore, the Debtor above named, and good cause therefor appearing, now, therefore,

"It Is Hereby Ordered, Adjudged, and Decreed *that the drawing account of said Debtor be and the same is hereby fixed in the sum of $1,000.00 per week, subject to the further order of this Court.*

"Dated this 5th day of June, 1940.

"ERNEST R. UTLEY
Referee"

[Rec. pp. 113 and 114.]

The record shows, without conflict, that payments at the rate of $1,000.00 per week were paid to Barrymore beginning June 6, 1940.

On August 2, 1940, an amended order was made by the Bankruptcy Court to make provision for the support of minor children of Barrymore. The pertinent part of this amended order reads as follows:

"AMENDED ORDER FIXING DRAWING ACCOUNT OF DEBTOR.

* * * * * * * *

"It Is Hereby Ordered, Adjudged and Decreed, that, subject to the further order of this Court, *the drawing account* of John Barrymore, debtor herein, be and the same is hereby fixed in the sum of One Thousand Hundred Seventy-five Dollars ($1,175) per week, commencing as of July 31, 1940, and

"It Is Further Ordered, Adjudged and Decreed that Samuel A. Miller, receiver herein, disburse said One Thousand One Hundred Seventy-five Dollars ($1,175) as follows:

"(1) One Thousand Dollars ($1,000) thereof to John Barrymore, debtor herein,

"(2) One Hundred Twenty-five Dollars ($125) thereof to Dolores Costello Vruwink, to be used *solely for the support and maintenance of John Blyth Barrymore, Jr. and Dolores Barrymore, minor children of debtor herein,*

"(3) Fifty Dollars ($50) thereof to John McKim Minton, Jr., trustee, *to be used solely for the support and maintenance of Diana Barrymore, a minor child of debtor herein;*

* * * * * * * *

"Dated this 2 day of August, 1940.

"ERNEST R. UTLEY
Referee in Bankruptcy"

[Rec. pp. 114, 115 and 117.]

(Comment: It will be noted that this amended order was designated "Order Fixing Drawing Account of Debtor" and in the body of the order it was designated as the "drawing account" of John Barrymore. This order directs the payment of $1,000.00 per week to Barrymore without reservation or restriction as to its use or purpose while the money being paid to the parent and trustee, respectively, of the minors specifically restricted the use of

the money providing that it be used "solely for the support and maintenance of" said minors.)

(It is agreed that the record shows, without conflict, that during this period, that is, from June 5, 1940, up to September 30, 1940, Barrymore had as his attorneys Mr. Joseph Scott, Mr. Jerry Giesler, and their associates, and that the respondent, Roland Rich Woolley, did not represent Barrymore in the bankruptcy proceedings until an order was made by the United States District Court on September 30, 1940, substituting Mr. Woolley and Hiram Casey as the attorneys for Barrymore in the bankruptcy proceedings.)

The order granting substitution of attorneys is as follows:

> "ORDER GRANTING SUBSTITUTION OF ATTORNEYS.
>
> "This matter coming before the Court for hearing on motion of the Debtor for substitution of attorneys, pursuant to notice filed Sept. 24, 1940; Roland Rich Wooley and Hiram Casey, Esqs., being present; there being no appearance in opposition.
>
> "Attorney Casey makes a statement. It is ordered that substitution of attorneys be granted as prayed. [114]" Sept. 30, 1940. [Rec. p. 119.]

On about September 20, 1940, Barrymore was having domestic differences with his then wife, Elaine Barrie Barrymore. On September 20, 1940, Barrymore employed the respondent, Mr. Woolley, to represent him to file

divorce proceedings. The agreement between Barrymore and Mr. Woolley reads as follows:

"September 20, 1940.

"Roland Rich Woolley, Esq.,
Attorney at Law
649 South Olive Street
Los Angeles, California

Dear Mr. Woolley:

"I hereby employ you as my counsel to file divorce proceedings against my wife, Elaine Barrie Barrymore, and to take such action in connection therewith as you may from time to time deem fit, subject, of course, to my approval.

"I further employ you to advise with me generally with respect to all my business and financial affairs.

"For your services in connection with the divorce proceedings aforesaid I agree to pay you the sum of $10,000.00, which shall include all your services in connection therewith up to and including the conclusion [23] of the trial of said action in the Superior Court of the State of California, in and for the County of Los Angeles.

"In respect to other and sundry services which you may render in connection with other matters, I agree to pay you a reasonable fee.

"Sincerely,

JOHN BARRYMORE.

"Approved:
ROLAND RICH WOOLLEY."

* * * * * * * *

[Rec. pp. 333-334.]

(Comment: This employment in the divorce proceedings by Barrymore of Mr. Woolley was ten days before Mr. Woolley and Mr. Casey became the attorneys for Barrymore in the bankruptcy proceeding.)

The record [p. 141] shows that from June 5, 1940 to September 18, 1940, the Receiver had paid Barrymore a total of $15,000.00 under the order of June 5, 1940 and the order of August 2, 1940, exclusive of weekly payments made to his minor children. The record shows [p. 138] that the Receiver had been paid the total sum of $32,-784.84 between June 5, 1940 and September 26, 1940, by Barrymore out of his earnings as a moving picture actor and radio performer.

(Comment: Throughout the proceedings, that is, from June 5, 1940, until May 12, 1941, when the respondent, Mr. Woolley, and his associate, Hiram Casey, were substituted out of the case by Barrymore, the payments to Barrymore by the Receiver were pursuant to the orders of June 5, 1940 and August 2, 1940. In November 1940 the weekly payment was voluntarily reduced to $900.00 and in March 1941 a reserve of $300.00 per week was set up out of earnings. At no time was there ever an order made by the Bankruptcy Court in any way modifying or restricting the free and uncontrolled disposition by Barrymore of the weekly payments made to him by the Receiver pursuant to said orders. Furthermore, the record will show that at no time during the entire proceedings from June 5, 1940 to the present date has there ever been a demand made or proceedings instituted to have an accounting made of the disposition of and the purposes for which the proceeds of the weekly payments to Barrymore were used, including the $15,000.00 paid to him between June 5 and

September 30, 1940, and while Barrymore was represented by other counsel. The only money for which an accounting is sought is the sum of $5,950.00 paid by Barrymore to respondent, Mr. Woolley, out of Barrymore's drawing account for legal services rendered Barrymore in the divorce case.)

The record shows that from June 5, 1940 until respondent, Mr. Woolley, and Mr. Casey were substituted out of the case, there had been paid to Barrymore pursuant to the orders of June 5, 1940 and August 2, 1940 over $40,000.00 and during that time [Rec. p. 194] Barrymore had earned $107,000.00.

The hearing of October 23, 1940, which was held less than four weeks after respondent, Mr. Woolley, became the attorney of record for Barrymore in the bankruptcy proceeding, is typical of the attitude of the Referee and the creditors respecting the drawing account of Barrymore. The record shows that prior to October 23, 1940, Barrymore's weekly drawing account of $1,000.00 had been held up by oral direction of the Referee, because Barrymore was unemployed. The following proceedings were had at the hearing on October 23, 1940, in the Bankruptcy Court:

"Los Angeles, California
Wednesday, October 23, 1940
10:00 o'clock, A.M. Session

"The Referee: John Barrymore.

* * * * * * * *

The Referee: Is Mr. Barrymore working now?

Mr. John Barrymore: Yes.

The Referee: And that is under the new arrangement with what company?

Mr. Barrymore: The Universal.

* * * * * * * *

The Referee: How much money is coming in a week now?

* * * * * * * *

Mr. Ahlport (attorney for Receiver): That is my recollection. It is coming in at that rate of $5,000 a week.

The Referee: Upon checking on that with the Receiver I am willing to restore the old arrangement (referring to the order of June 5, 1940).

* * * * * * * *

The Referee: You may prepare an order restoring the previous order to Mr. Barrymore, both to Mr. Barrymore and the children. (Referring to the orders of June 5 and August 2, 1940. However, the records show that said order had not been vacated or set aside by any order of the Referee at this time and remained in full force and effect, except as hereinafter mentioned, until June 19, 1941.)

Mr. Ahlport: Very well. [Rec. pp. 366, 367, and 368.]

* * * * * * * *

"The Voice: I represent one of the unsecured creditors. Does your Honor mean to restore it at this time or make it retroactive to take up the weeks during which I think your Honor was holding the order up? I think if additional funds be not distributed, in case of a formal bankruptcy, it may well result in—

The Referee: Here is the theory on which the Court suspended the order. There was a delay in offering the plan. *The Court had no assurance at that time that a plan (6) would ever be offered, and*

there was a possibility also of a straight adjudication. Of course, if Mr. Barrymore had asked for an adjudication any earnings he would make since the date of the filing of the petition would not be an asset in the case, and it was on that theory that I thought the Court should be liberal as long as funds are coming into the estate, to allow a reasonable amount to him to meet living expenses. You cannot expect a man to work without that.

Mr. Woolley: We have been subjected to a great deal of deprivation since the order was made cutting off the allowance. You cannot kill the goose that is laying the golden egg.

* * * * * * * *

The Referee: Under the circumstances seeing there is income coming in again — my thought in cutting off the order when I did was with the thought of not depleting the estate."

* * * * * * * *

[Rec. pp. 368, 369 and 370.]

"Mr. Miller: We got a check last week for $2500 which was for three days, and the check which I will get either today or tomorrow will be for a full week of $5,000. Then in addition, your Honor, there have been some receipts,—$2200 from one broadcast which I received and $1100 from another broadcast which I have not received but I will get.

The Referee: Beginning with the week you began to receive these or if a proportionate week a proportionate allowance may be made.

Mr. Miller: On the basis of the original order? [The order of June 5, 1940.]

The Referee: Yes. The original order may be restored effective with the date you commenced to receive the funds.

Mr. Woolley: Why should Mr. Barrymore be penalized for the period in between from the time he was cut off up to the time the funds began to come in? Mr. Barrymore has been trying his best, your Honor please.

The Referee: That would amount to a depletion in the [8] estate. I don't think the Court at this time would be warranted in going that far. It may be circumstances will develop later which would warrant a further modification of the order but I do not think so now, especially in view of the fact there is another delay asked for in the offering of the plan.

Mr. Woolley: I said before we came in Mr. Barrymore *had proposed voluntarily to turn over his personal earnings provided such an allowance would be given to him.* That was the reason why in the first instance proposals were included in the petition and he made that suggestion. Now it would seem that since he is trying to work out that plan —

The Referee: The Court is not making an order which would amount to a denial of your request at this time. It is without prejudice to your right to renew it at a later time.

Mr. Woolley: Very well." [Rec. pp. 370 and 371.]

"The Referee: If the Court makes any allowance to Mr. Barrymore for the time that he was cut off it will be because *of his earnings since the Court eliminated that item, and for no other reason.* Are there any creditors who wish to be heard from on this matter?

* * * * * * * *

The Referee: * * * Are there any objections to the granting to Mr. Barrymore of this $2500 which the Court deprived him of during the period he was not working?"

* * * * * * * *

[Rec. pp. 378 and 379.]

(Comment: The proceedings at this hearing of October 23, clearly demonstrate that

(a) The Referee in Bankruptcy was ordering money paid by the Receiver as long as Barrymore was employed and earning money. And that payments were not based upon his personal requirements which of course continued irrespective of earnings.

(b) That the current earnings of Barrymore were not an asset of the bankrupt estate.

(c) That the payments being made by the Receiver were being ordered by the Referee pursuant to the original order of June 5, 1940. The $2500 was ordered paid by the Referee not on the suggestion or representation of respondent, Mr. Woolley, or his associates but on the Referee's own initiative when he was satisfied that Barrymore was being paid out of current earnings and was not depleting his estate.)

The record shows that in the proceedings before the Referee in Bankruptcy, Barrymore's divorce proceeding in the State of California was discussed on October 9, 1940, November 6, 1940, November 7, 1940, November 26, 1940, March 18, 1941, and April 21, 1941, and that extensive legal services were being performed by the respondent, Mr. Woolley, on behalf of Barrymore in the divorce proceedings. [Rec. pp. 373, 378, 384, 385, 388, 438, 439, 497, 500.]

Typical of the discussion of the divorce proceedings was the following taken from the hearing, Wednesday, November 6, 1940:

"The Referee: John Barrymore.

Mr. Casey: Ready. The first matter we would like to take up, more or less informally, is the question that has been heard on the payment at this time to Mr. Barrymore of the two or three weeks at a thousand dollars a week he had not received during the time he was not working in the interim. The reason we are particularly renewing this at this time and urging the order be made and releasing that amount to Mr. Barrymore at the present time is two-fold: First, we think that under the plan offered and the agreement to be made and the fulfillment of it, out of which contracts $20,000 is earned, that he really is legally and morally entitled to have that amount inasmuch as it is necessary for him to have it to maintain himself. Then we have reached the *stage in settlement with his present wife, Mrs. Elaine Barrie Barrymore, where this is very advantageous to Mr. Barrymore himself, and naturally will inure to the benefit of the general creditors and the secured creditors, too, because if there is a prolonged quarrel going through the divorce courts between Mr. Barrymore and Mrs. Barrymore it will be not only expensive to handle but highly detrimental to his ability to keep and make new film contracts. In other words, publicity would be detrimental to his (3) general standing with the public.* The public, we know from experience, does not like it. We are

now in a position where we can make a settlement with Mrs. Barrymore which is very advantageous but in order to do it we need more money than Mr. Barrymore has at present, more cash. If we had this $2500 which we feel he is entitled to out of the moneys he earned,—he earned $20,000 on his radio contracts, on top of which he earned $3600 or something like that, and he has some radio money coming in and at this time we would like to make that as a motion directed to the Court that the sum of $2500 be released at this time to him to take care of those two and one-half weeks which he had not drawn." [Rec. pp. 373 and 374.]

(Comment: This discussion by Mr. Casey, associate of respondent, Mr. Woolley, indicates that Barrymore had been denied his payments of $1000 per week for two and one-half weeks prior to November 6 (1940), and counsel were calling to the attention of the Referee that Barrymore was entitled to receive $2500.)

The following proceedings were then had on November 6, 1940:

"The Referee: Mr. Miller, how much money have you received since Mr. Barrymore went back to work?

* * * * * * * *

The Referee: That makes about a total, when you get the $5,000 and the $2,200 of about $22,950, that you have received since the Court cut off that allowance.

Mr. Miller: That is right, your Honor." [Rec. pp. 374 and 375.]

The hearing of November 7, 1940 hereinafter quoted, further clarifies the position of the Referee respecting the reasons for the payment of the $2,500.00:

"Los Angeles, California,
Thursday, November 7, 1940.
10:00 o'clock, A.M. Session

* * * * * * * *

"Mr. Durst: I would like to inquire, I read in the newspapers there is to be a settlement with Mrs. Barrymore of some sort. What is the situation regarding that?

Mr. Casey: I think as the Court stated yesterday Mrs. Elaine Barrymore has nothing to do with these proceedings, as such. I am perfectly willing to answer your question. We announced it here yesterday and stated that and the Court stated at that time she could not participate here and her desires made no difference. We will put through a settlement with her.

* * * * * * * *

The Referee: But the present Mrs. Barrymore, as I stated yesterday, has no standing in this court. She is not a creditor. The Court is not considering her in any respect in determining the issue in this matter.

Mr. Durst: To determine the issue of whether Mr. Barrymore is to be given the $2500?

The Referee: That is the matter before the Court. It was disclosed yesterday that Mr. Barrymore since

the Court had stopped his allowance had brought into the estate with his work and efforts since something in the neighborhood of $20,000. The question arose as to whether or not he should be paid money for the time, *on the weekly allowance for the time the Court withheld it from him.*" [Rec. pp. 381, 384 and 385.]

(Comment: The Bankruptcy Court makes it very clear that:

(a) It was not recognizing any of the claims of Mrs. Elaine Barrymore in the bankruptcy proceeding to the assets of the bankrupt.

(b) That the Bankruptcy Court divorced itself completely from the State Court divorce proceedings in which Mr. Woolley was the attorney for Barrymore but at the same time, paid the $2,500.00 to Mr. Barrymore to do with as he saw fit. There were no restrictions upon the use to which the $2,500.00 was to be put by Barrymore or respondent, Mr. Woolley, as his attorney. The Bankruptcy Court refused to have Elaine Barrymore's property rights recognized in or become a part of the bankruptcy proceeding. The Referee in Bankruptcy, however, knew to what purpose the money was being put that was being paid to Barrymore and placed no restriction upon its use, that is, whether it was to be paid to Elaine Barrymore as a part of her property settlement, or to her attorneys for services, or both.)

On November 28, 1940, respondent, Mr. Woolley, prepared an order voluntarily reducing the weekly drawing account to Barrymore from $1,000.00 to $900.00 per week. The consent reads as follows:

"CONSENT TO REDUCTION OF WEEKLY ALLOWANCE AND ORDER THEREON

"To the Honorable Ernest R. Utley, Referee Herein, and to Samuel A. Miller, Receiver Herein:

"The undersigned, as attorneys of record for John Barrymore, Debtor in the above entitled proceedings, do hereby consent, without prejudice, to the making on an Order reducing the *weekly allowance or advance* to said John Barrymore as debtor herein, from the sum of $1000.00 heretofore allowed by the Order of June 5th, 1940, to the sum of $900.00 per week; this Order to remain in effect for such period of time as the weekly income from the earnings of said Debtor shall be insufficient to meet and pay the Orders of the Court heretofore made in this matter, but without prejudice to the reinstatement of the original Order of June 5th, 1940, and without prejudice to the repayment of said weekly deductions of $100.00 if, as and when the future earnings of said Debtor, John Barrymore, shall be sufficient to reinstate the original Order of June 5th, 1940, and make up the deductions herein provided for. This consent to be effective beginning with the weekly allowance for the week ending November 27th, 1940.

"Dated: November 28th, 1940.

"ROLAND RICH WOOLLEY &
HIRAM E. CASEY,
By JOSEPH F. RANK,
By HIRAM E. CASEY,
Attorneys for Debtor.

"It Is So Ordered.

"Dated: November 29th, 1940.

ERNEST R. UTLEY."

[Rec. pp. 144 and 145.]

The hearing before the Referee, December 12, 1940, also demonstrates that the Referee was solely determining the amount of money to be paid to Barrymore and the reasons for such determination. The following is a colloquy between the Referee and Mr. Durst, an attorney who was a creditor:

"Los Angeles, California. Thursday, December 12, 1940. 10:00 o'clock, A. M. Session.

* * * * * * * *

"Mr. Durst: Do I understand in the meantime Mr. Barrymore is still drawing a thousand dollars a week?

The Referee: He apparently reduced that to nine hundred.

Mr. Durst: I object to any further payments being made to Mr. Barrymore from this time on until he gets back to work. [30]

The Referee: Is he still earning a thousand dollars a week?

Mr. Woolley: Yes, he is still on the radio.

The Referee: I see no reason for changing the order. It will stand. (Referring to order of June 5, 1940.)

Mr. Durst: The court understands that takes another $3,000 out of this estate for the three or four weeks the Court is continuing it.

The Referee: Mr. Durst, when Mr. Barrymore was relieved of his contract and was only earning a thousand dollars a week I stated to some of counsel, I don't know who it was, that I would not permit him to draw more out of the estate than he was earning, and he apparently reduced it to nine hundred. He was earning a thousand dollars a week and that

was the basis for that. The Court was looking after that matter itself to see that he was not drawing out more than he was putting in. He voluntarily reduced it to nine hundred a week.

* * * * * * * *

Mr. Durst: Is it in the Court's order if he earns nothing he draws nothing? [31]

The Referee: When he stops earning the Court will look after that itself." [Rec. pp. 394, 398, 399.]

An original plan for an arrangement was filed on November 6th, 1940 [R. 119-125]; an amended plan on February 7th, 1941 [R. 146-163]; and a second amended plan on April 9th, 1941. [R. 170-185.] Under the first one, the proposal was to pay into court the sum of $25,000 in full satisfaction of the claims of unsecured creditors. However, under the amended plan, the proposal was entirely changed, and it was proposed that the earnings of Mr. Barrymore be turned over to the Receiver, and that he receive out of the fund the sum of $600 per week so long as his earnings equalled that sum, and that a reserve in the sum of $400 per week be created each calendar year as a reserve for any period of time during which he was not employed, at the end of which any surplus be turned over to the creditors. [R. 155-156.] It further provided that $100 per week be turned over to Mr. Barrymore as a general retainer for an attorney. An amendment to this proposal was filed March 18th, 1941, having the same provisions with respect to Barrymore, but limiting the reserve to $7500. [R. 164-167.] Under the second amended plan, it was proposed that he receive the sum of $700 per week, and that the reserve fund be $400 per week until $7500 was accumulated. [R. 180.] The plan

subsequently filed February 7, 1941, above mentioned, had been prepared and submitted by Mr. Barrymore to his creditors who had suggested various amendments, and that plan was under discussion at a hearing on January 31, 1941, which is typical:

"Los Angeles, California
Friday, January 31, 1941.
10:00 o'clock, A. M. Session.

* * * * * * * *

"The Referee: Generally, what is the proposed plan?

"Mr. Rank: Well, as amended, generally speaking, the plan is Mr. Barrymore is *going to voluntarily agree to accept $600 a week* for his personal expenses, with the provision that $400 a week will be put in a reserve so if *he is unemployed* at any time he can draw from the reserve, but at the end of each calendar year any money unexpended will be available for prorata distribution among crditors. (41)"

[Rec. pp. 406, 407, and 408.]

(Comment: It will be noted that Mr. Barrymore, under this plan, was to receive $1,000.00 per week, $600.00 to be paid without restriction as to its use and $400.00 to be put in a reserve to take care of Mr. Barrymore if he should be unemployed. The language used by Mr. Rank is significant:

"* * * the plan is Mr. Barrymore is going to *voluntarily agree to accept* $6.00 a week."

It shows clearly that the Referee and everyone else were fully aware that the earnings of Barrymore subsequent to June 5, 1940, when the petition for arrangement was originally filed, were not assets of creditors, and Bar-

rymore and the creditors were bargaining as to the amount that he was to be paid in consideration of turning in to the Receiver his earnings as an actor and radio performer. It applied to a plan which was to be effective only when approved by the Referee. This is clearly shown by the proceedings of January 31, 1941, of which the following is a part.)

> "Mr. Durst: I think the allowance should be cut down now. Three hundred should be set aside as the reserve and he be only paid six hundred a week now.
>
> "Mr. Rank: *We don't agree to that,* and there shows the lack of cooperativeness on Mr. Durst's part, to raise that question. We have been trying to get the plan through and we are not going to be committed to any such amount because we do not think that is a fair amount. Mr. Barrymore is only willing to do it because of the hope he has in working it out.
>
> * * * * * * * *
>
> "The Referee: Well, I think since it has gone this far it may as well stand for another three weeks as long as he is employed for enough to pay that and create a little surplus in the hands of the Receiver. It may as well remain as it is until February 21."
> [Rec. pp. 416, 417, 418.]

The statement of counsel was, in effect, notice to the Referee and the creditors that debtor's counsel were continuing to proceed upon the basis that any reduction in Mr. Barrymore's drawing account would require a sanction by him if the continued contribution of his earnings to the Receiver was expected.

The hearing before the Referee on March 18, 1941, [Rec. pp. 436 to 489, incl.] is the one upon which the

petitioner places great stress. This was the hearing where the plan of arrangement was under discussion. It was apparently favored by the taxing authorities but was opposed by certain creditors. The plan called for the unrestricted payment to Barrymore of $600.00 per week and the placing of $400.00 in reserve to take care of Barrymore while he was unemployed, and also to aid him in paying his current taxes. The Referee was skeptical of the success of the plan so far as it affected the general creditors. He pointed out clearly the effect of adjudication upon the earnings of Barrymore subsequent to June 5, 1940. The following statements of the Referee and others, are illuminating:

"Los Angeles, California
Tuesday, March 18, 1941
10:00 o'clock, A.M. Session.

* * * * * * * *

"The Referee: * * * Here is the situation, of course. I seriously doubt under this set-up that general creditors will ever get any money. The only thing you are accomplishing by this plan at all is the payment of the tax claims and the payment to Diana Barrymore and Mrs. Vruwink, and of course the State taxes. You are getting some of those items paid where probably otherwise they would not be paid. That is about all you are accomplishing in this plan. Mr. Barrymore is not getting any younger, his earning ability is gradually getting less and less. It is not increasing. Your tax situation is very, very liable to increase very substantially. I would not be at all surprised, if this plan is approved under the present set-up, you are going to find you are running delinquent on this payment of taxes within this year to both the Government and the State. (95)

"Now, on the other hand, what do you accomplish by a dismissal of the plan, or an adjudication? *If there is an adjudication creditors would not be entitled to any of the present earnings of the bankrupt, except, of course, the tax claimants.*

* * * * * * * *

"The Referee: Mr. Durst, mark my word if this plan is approved the only reason the Court is approving it is that at least the taxing agencies would get something that otherwise they would not get, and also perhaps the children. I don't think general creditors will ever got anything."
[Rec. pp. 436, 456, 457, and 460.]

(Comment: On March 18, 1941, at this same hearing for the first time the question was brought up respecting an accounting of moneys paid to Barrymore. As of March 19, 1941, respondent, Mr. Woolley, had been paid by Barrymore on account of services rendered Barrymore in the divorce proceeding the sum of $5,150.00 of the total of $5,950.00 involved in this present dispute.)

Mr. Durst, an attorney and creditor, first raised the question of an accounting. The portion of the transcript and the discussion respecting it is as follows:

"Mr. Durst: * * * I think there should be an accounting of all moneys paid to Mr. Barrymore. It is about $40,000 and I think the creditors are entitled to know where it went. I think the debtor's attorneys should be required to file an accounting for the expenditures of that money up to date."

* * * * * * * *

"Mr. Wix: (attorney for creditor) I have not agreed with many things in this proceeding, but I do agree with the thought that Mr. Barrymore should

make an accounting and there should be some finding here or some information before this Court indicating whether he needs $600 a week. I don't think he does. He doesn't pay anything for rent, and I don't think any person who has $110,000 of obligations outstanding has a right to be living on $600 a week, and I think that is the thing that is really wrong with the plan."
[Rec. pp. 461 and 462.]

(Comment: The Referee ignored the demand of the attorneys for creditors. He made no order or suggestion that respondent, Mr. Woolley, or his associate counsel, state what disposition Barrymore had made of the approximate $40,000 paid to him out of his earnings. Petioner cites on page 46 of his brief a statement made by the Referee subsequent to the approval of the plan and months after the substitution of Mr. Woolley wherein he states that he had requested or suggested an accounting. However, in this he is clearly in error, and the District Court so found. (Finding VIII, R. 350.) It will be noted that no citation to the record where such accounting was ever requested during the proceedings is made by petitioner, and this notwithstanding the petitioner has been repeatedly challenged to show that the Referee ever by a single, uttered word indicated that he wanted or felt he was entitled to an accounting of the money allowed to Mr. Barrymore. The record already quoted, clearly shows that the Referee knew that the money being paid to Mr. Barrymore was his money to do with as he saw fit. The attorneys making the demand for the accounting must have been of a like mind because never again was the question of an accounting raised.)

(As we have observed, the hearing on March 18th concerned the amended plan and a proposed amendment thereto upon the approval of which Mr. Barrymore was to receive $600 per week. Mr. Durst, one of the creditors, stated at the outset that he believed "the thing to do would be to proceed with the plan." [Rec. p. 436.] Mr. Wix had prepared an analysis which he contended showed that the proposed plan was unworkable, which the Referee stated he believed should then be considered. [Rec. p. 442.] The Referee objected to the provisions in the proposed plan that Mr. Barrymore receive $600 per week and $100 for his attorneys, and stated that he believed in these two items a substantial reduction could be made. [Rec. p. 457]; that if he was given $600 per week, he could pay his counsel out of that without additional expense. [Rec. p. 458.] Later in the discussion, Mr. Casey made the statement that "$600 is the least Mr. Barrymore can get along on by his own standard of living." The Referee then stated, "What *would* he spend $600 a week for?" It will be noted that he does not state, "What *has he been* spending $600 a week for?", but, "What *would he spend*" it for. It should also be noted that at that time *Mr. Barrymore was receiving not $600 a week, but $900 per week*, further showing that it is the future under the plan which is under discussion, and not the money that has been paid to Mr. Barrymore pending its approval. This is further clarified by Mr. Casey's statement, "If we were asking this money to be allowed out of present assets * * *." [Rec. pp. 466-467]; and again when Mr. Casey had mentioned his expenditures for help, the Referee states, "He does not pay them any *$600 per week*." [Rec. p. 467.] The record shows this again on page 468, when the Referee states, "What is he going to do with $100 a day?" When various expenditures are mentioned, *each is de-*

ducted from the $600, and not from the $900, the least amount from which the deduction would be made were they discussing his past expenditures. [Rec. p. 468.]

Petitioner emphasizes on page 40 of his brief a statement by Mr. Woolley, "You asked for it, Your Honor, and I am trying to give it to you." But a reading of simply the portion of the record quoted by petitioner on pages 33 to 35 of his brief, shows that Mr. Woolley's statement had reference to the Referee's statement, "What is he *going to do* with $100 per day?" (Petitioner's brief p. 34). Even in the discussion as to what he needed $600 a week for it is pointed out that the items mentioned do "not take into consideration any *extra expenses*." [Rec. p. 469.] That Mr. Barrymore desired $100 per week for his counsel was made clear by the very terms of the plan.

The foregoing probably suffices to show what was under discussion. If more is required, see the following: the statement of Mr. Woolley that it is Mr. Barrymore who is *going to lay* the golden egg [Rec. p. 469]; the statement of the Referee immediately following the discussion, that he is not going to approve a plan that is not workable [Rec. p. 470]; Mr. Woolley's statement that "This plan is the result of conferences" [Rec. p. 470]; and Mr. Durst's statement that "When we were in these conferences (discussing the plan) $600 per week was a compromise too." [Rec. p. 474.]

At the conclusion of the foregoing hearing, the court reduced the allowance to $600 per week with an extra $300 per week placed in reserve. [Rec. p. 485.]

At a hearing on April 21st, the court had before it the second amended plan, filed April 9, 1941. [Rec. p. 185.] At this hearing, Mr. Black, counsel for one of the Barry-

more children, maintained that the allowance under the plan was too high. Mr. Rank replied that he believed it was modest, inasmuch as Mr. Barrymore was a man who had to have certain money for upkeep and maintenance; that he had a large staff of servants and "has to have" a lot of *legal assistance* to work out his problems, bills and obligations [Rec. p. 496], and, further, that he did not believe the creditors should object to the proposed allowance of $700 per week, when they consider that it included his *expense for legal services* and medical attention, as well as other expenses that he would have to pay. [Rec. p. 497.] This statement not only had reference to the plan, but specifically mentions *legal services*.

Respondent, Mr. Woolley, and Mr. Casey, were substituted out as Mr. Barrymore's attorneys in May, 1941. Thereafter, on June 19, 1941, and when other attorneys represented Mr. Barrymore (the same attorneys who are now representing petitioner), the Referee made an order approving the plan of arrangement as follows:

"ORDER APPROVING PLAN OF ARRANGEMENT.

* * * * * * * *

"1. There shall first be paid to Samuel A. Miller as disbursing agent for the debtor, John Barrymore, out of said fund, the weekly sum of $700.00, providing, however, that the Court herein reserves the right to modify said weekly payments for reason deemed sufficient by the Court in its discretion.

* * * * * * * *

"3. There shall next be paid into a special reserve fund, to be maintained by said receiver, the sum of $400.00 per week (or such amount up to $400.00 per week as your debtor shall earn in excess of the amounts provided for under subdivisions 1 and 2

above), until the total amount in said special reserve fund shall equal $7500.00, and thereafter the payments into said fund shall continue only to the extent necessary to maintain said fund in said amount of $7500.00.

* * * * * * * *

"Dated this 19th day of June, 1941.

"ERNEST R. UTLEY

Referee in Bankruptcy (206)"

[Rec. pp. 221, 227, 228, and 232.]

(Comment: The hearing on March 18, 1941, clearly demonstrated that Mr. Barrymore could not use for just living expenses the sum of $600.00 per week. The respondent, Mr. Woolley, is severely criticized for inducing the Referee, as claimed by petitioner, to maintain the payments to Barrymore at first, $1,000.00 per week and then later at $900.00 per week, and yet in the final order approving the plan of arrangement when Barrymore was represented by counsel other than respondent, Mr. Woolley, and his associates, the Referee in Bankruptcy approves the above order giving Barrymore not $600.00 per week, but $700.00, to be used by him without restriction, and not $300.00 in reserve per week as formerly provided, but $400.00 per week. Furthermore, with the approval of the plan of arrangement, no suggestion was made by the Referee or by Mr. Barrymore or his then attorneys, or the creditors, that there be any accounting from Barrymore respecting the disposition of over $40,000.00 paid to him in approximately one year from the time of the filing of the petition for arrangement on June 5, 1940.)

United States District Judge Peirson M. Hall reviewed the entire record before the Referee and made his order reversing the order of the Referee in Bankruptcy by which the latter had ordered repaid into the Bankruptcy Court $5,950 by respondent, Mr. Woolley, being the sums Barrymore had paid to respondent out of his drawing account.

The pertinent part of the findings of the United States District Judge are as follows:

"III.

* * * * * * * *

"It is not true, as alleged in the Amended Petition of John Barrymore against Roland Rich Woolley herein, dated October 25, 1941, that said sums paid to John Barrymore under said orders were allotted only for his living expenses, or were allowances to him only for his living expenses. The payments made to said John Barrymore, and the orders for such payments did not in any wise limit or restrict the use thereof by him to his living expenses, or otherwise, or for any specific purpose.

"IV.

"Prior to September 20, 1940, John Barrymore became involved in matrimonial difficulties with his wife, Elaine Barrymore. On September 20, 1940, and prior to the time Mr. Woolley became one of the attorneys for Mr. Barrymore in the above entitled arrangement proceeding, John Barrymore entered into a written contract with Roland Rich Woolley, employing him to act as his counsel in connection with contemplated divorce proceedings and the adjustment and settlement of the property rights and interests of the Barrymores. By the terms of said contract, Mr. Barrymore agreed to pay to Mr. Woolley, as his

compensation for such legal services, the sum of $10.000.00, this sum to include all his services in the Superior Court of Los Angeles County, California. This written contract was entered into by John Barrymore freely and voluntarily, and said contract was never rescinded by said John Barrymore. The services agreed to be performed by Roland Rich Woolley thereunder were fully and completely performed by said Roland Rich Woolley. (308)

"V.

* * * * * * * *

"Said sums, and the whole thereof, were paid to Roland Rich Woolley by John Barrymore from personal earnings of John Barrymore, earned subsequent to the filing of his original petition for an arrangement herein, and from sums which were paid to John Barrymore pursuant to the provisions of the said order of June 5, 1940, as thereafter amended by the subsequent said orders of August 2, 1940, November 29, 1940, and March 19, 1941. Said sums received by Roland Rich Woolley, as aforesaid, were the sole and unrestricted property of John Barrymore, paid to him without restriction or limitation. The entire sum was paid to Roland Rich Woolley for legal services rendered in connection with the divorce proceedings between said John Barrymore and his then wife, and said sums were not paid for services rendered in any matter relating to or con- (309) nected with this bankruptcy proceeding.

"All of the aforementioned payments received by Roland Rich Woolley were received by him with the consent and approval and at the express direction of said John Barrymore.

* * * * * * * *

"VII.

"The divorce attorney fee agreement of September 20, 1940, was not submitted to or approved by the said Referee in Bankruptcy, nor was the said Referee in Bankruptcy informed of the terms thereof or of the payments made to Roland Rich Woolley thereunder, *but, in this connection, the Court finds that neither said agreement, nor the legal services to be performed thereunder, related to or concerned the above entitled arrangement proceeding, or the assets of John Barrymore possessed by him at the time of the filing of his original petition for an arrangement herein.* The Court further finds that the disclosure to the said Referee in Bankruptcy or to the creditors of the debtor's estate by Roland Rich Woolley, of the existence of said divorce attorney fee contract, or of its terms or provisions, or of the payments to Roland Rich Woolley thereunder out of the earnings of John Barrymore subsequent to June 5, 1940, was neither necessary nor required of him, and that it was not the duty of Roland Rich Woolley, nor was it incumbent upon him, to apprise the bankruptcy court or the (310) creditors of the debtor's estate of the contents of the said agreement, or the payments made to Roland Rich Woolley thereunder by John Barrymore.

"The Court further finds that the pendency of the said divorce proceedings between said John Barrymore and his wife were discussed in open court before the said Referee in Bankruptcy in the above entitled arrangement proceeding on October 9, 1940, November 6, 1940, November 7, 1940, November 26, 1940, March 18, 1941, and April 21, 1941, including the fact that extensive legal services were being performed by Roland Rich Woolley on behalf of John

Barrymore in connection therewith, as well as fact pertaining to the progress, development and termination of said domestic litigation. The said creditors and the said Referee in Bankruptcy knew at said times that the assets possessed by John Barrymore at the time of the filing of his original petition for arrangement herein were in the custody of the bankruptcy court; that all sums earned by him subsequent to June 5, 1940, had been voluntarily paid by or through John Barrymore to the said Receiver in Bankruptcy, and that the said sums received by said John Barrymore subsequent to June 5, 1940, as ordered paid to him by the said Referee in Bankruptcy, constituted the only funds from which payments could be made by him on account of services performed by his attorney in said domestic controversy and litigation.

"The Court further finds that the said Referee in Bankruptcy and the creditors knew as early as October 9, 1940, that an agreement existed between Roland Rich Woolley and the debtor for the debtor's legal representation by Roland Rich Woolley in the divorce matter, and knew or should have known, that said Roland Rich Woolley was being paid, or would be paid, compensation for said services from sums received by John Barrymore as an allowance herein.

"VIII.

"It is not true that the said orders of the said Referee in (311) Bankruptcy providing for a drawing account or allowance to debtor, were made by the court in this proceeding upon the representation by Roland Rich Woolley that the sums so allowed were necessary for debtor's maintenance. In this connection the Court finds that the order providing for the drawing account or allowance to John Barrymore

was made on June 5, 1940, and more than three months prior to the date said Roland Rich Woolley became one of John Barrymore's attorneys in the above entitled arrangement proceeding, and that the order so made on said June 5, 1940, continued in effect during the entire period that Roland Rich Woolley represented the debtor in this arrangement proceeding, except to the extent that it was voluntarily reduced $100.00 by John Barrymore on November 29, 1940, and to the extent that the said Referee in Bankruptcy restricted the use of $300.00 thereof by his order of March 19, 1941, hereinabove mentioned, and except for the period during which payments were withheld while the debtor was unemployed.

"The Court further finds that pursuant to said order of June 5, 1940, and as amended on August 2, 1940, for a drawing account or allowance, there was paid to John Barrymore by the said Receiver, from debtor's earnings for services rendered by the debtor subsequent to June 5, 1940, the sum of $42,500.00, covering the period from June 5, 1940, to May 7, 1941.

"The Court further finds that from June 5, 1940, up to May 17, 1941, the date when Roland Rich Woolley and Hiram E. Casey ceased to be the attorneys for John Barrymore in the above entitled proceeding, that neither the Referee in Bankruptcy nor the Receiver in Bankruptcy ever sought, requested or demanded an accounting of said money paid over to John Barrymore pursuant to said order of June 5, 1940, and as amended on August 2, 1940.

"The Court also finds that the drawing account or allowance of John Barrymore was not made or continued upon any representa- (312) tions by Roland Rich Woolley, but was made and predicated upon John Barrymore continuing voluntarily to pay into court all his personal earnings as an actor in excess of sums which he sought to withdraw, and upon such earnings so paid in being in excess of amounts paid to him pursuant to said orders for an allowance.

"It is not true that Roland Rich Woolley concealed from the said Referee in Bankruptcy the fact that the sum of $5950.00, or any sum, was paid to him as attorney's fees in the divorce matter. The Court finds that said Roland Rich Woolley did not state the amount of his divorce fee to the Referee for the reason that he properly believed that John Barrymore was entitled to use his drawing account or allowance for such purposes as he saw fit, including the payment of attorney's fees for any legal services of any type rendered outside of the bankruptcy proceeding, and that the Referee knew that said Roland Rich Woolley was receiving compensation for his legal services in said divorce action, and that the Referee was not concerned with, or interested in the amount or payment thereof, providing it was paid from the said allowance or drawing account."

[Rec. pp. 344, 345, 346, 347, 348, 349, 350, and 351.]

The Circuit Court of Appeals, with the full record before it, affirmed the judgment of the District Court.

(Comment: There is no conflict in the evidence. The United States District Judge and the Circuit Court of Appeals refused to accept the unwarranted conclusions made by the Referee from the evidence before him.)

The foregoing facts clearly demonstrate that:

1. The monies paid to Barrymore were paid out of his future earnings acquired subsequent to June 5, 1940.

2. The weekly drawing account paid to Barrymore was agreed to and fixed months before Mr. Woolley ever represented Mr. Barrymore in any capacity.

3. The "drawing account" paid to Barrymore was not for his use solely as living and household expenses but was a "drawing account" to be used by him as he pleased and without restriction or control of the Referee or the creditors respecting payments ordered and paid.

4. Barrymore had a right to employ counsel to represent him in his divorce action and settlement with his wife. The Bankruptcy Court refused to take cognizance of the divorce proceedings. The divorce case was separate and removed from the bankruptcy proceeding. Barrymore had a right to contract with respondent, Mr. Woolley, to represent him therein. Respondent, Woolley, could not claim fees in the Bankruptcy Court for services rendered in the divorce action.

ARGUMENT.

No Grounds Are Shown for the Granting by This Court of a Writ of Certiorari.

(a) No Important Question of the Federal Bankruptcy Law Undecided by This Court Is involved.

Petitioner refers to Rule 38-5, Subdivision (b) as a basis for his petition, but fails to show grounds for the exercise of the discretion of this court for the granting of a writ of *certiorari*. The contention that the Circuit Court has determined matters in connection with the effect of a subsequent adjudication of a debtor who has filed a petition under Chapter XI is based upon a misapprehension of the decision of the Circuit Court. The determination of the ownership of funds remaining in the hands of a receiver pursuant to a debtor's plan of arrangement and undistributed to creditors, which petitioner states is involved in this case, is in no wise involved therein. *The facts outlined above show that the case does not involve any money paid over by a debtor to comply with the terms of a plan, or the ownership of such funds upon a subsequent adjudication.* The court does not and could not in this action determine who would be entitled to such funds. Petitioner is mistaken when he states, "In this matter the effect is that the funds remaining in the hands of the receiver, proceeds of the earnings of the debtor paid into court in accordance with the debtor's plan of arrangement and undistributed to creditors, become the property of the debtor's probate estate." (Petitioner's Brief, p. 14.) The statement of the Circuit Court upon which petitioner relies (See p. 13 of his brief) is prefaced with the statement showing that it has reference to money paid to the respondent. As shown in the statement of facts, *all money* paid to respondent was paid from earnings of the debtor

after the filing of his petition and *before* the approval of any plan. They were not funds in the hands of a receiver for distribution under a plan approved by creditor, nor were they any part of the funds which the debtor agreed should be distributed under the provisions of the plan approved by the court. Therefore, it is apparent that, assuming petitioner is right in his contention that money which is in the hands of a distributing agent under an approved plan at the time of an adjudication belongs to the creditors and not to the debtor, the statement of the court is nevertheless correct that the *money here involved* belonged to the debtor.

This being a proceeding under Chapter XI of the Bankruptcy Act, no jurisdiction over future earnings of a debtor exists. While such jurisdiction is given under Chapter XIII, proceedings under that Chapter are limited to wages earned that were not to exceed $3600 a year. (B. A. Sec. 606, Subd. 8.) Chapter XI contains no similar provision. Consequently, as observed by the Circuit Court in its opinion, any existing jurisdiction would have to depend upon the arrangement proposed by the debtor. (See Opinion, Brief of Petitioner, p. 59.)

While earnings of the debtor were voluntarily paid over to the receiver in the interim between the filing of his petition and the acceptance of the plan, in anticipation of the acceptance of some plan by the creditors, notwithstanding that no procedure requires or authorizes such action, the plan offered and accepted by the creditors provided, as stated in the opinion of the Circuit Court, that "'all earnings of the debtor—*earned and payable after the adoption and approval of this plan*'—should be paid to the custodian or disbursing agent." (Opinion, Petitioner's Brief, p. 63.) The court then points out, "It will be

observed that there was no agreement or obligation upon the part of the bankrupt to pay any money upon his proposed plan of arrangement until the confirmation of his plan of arrangement on June 19, 1941." (Opinion, Petitioner's Brief, p. 65.) Therefore, contrary to the contention of the petitioner that the decision of the court affects "funds remaining in the hands of a receiver—paid into court in accordance with the debtor's plan," no such funds are the subject of the court's decision. Actually, the plan for an arrangement had failed and the debtor had been adjudged a bankrupt when the Referee sought to compel respondent to pay the money here involved to the trustee. That money consisted of earnings of the debtor subsequent to the filing of his petition and prior to the adoption of a plan and not payable to creditors under the plan which had failed.

The effect of petitioner's contention, that the funds involved in this case could be ordered paid over to the receiver and held for creditors, would be that they would receive not only what they agreed to accept under the approved plan, but, in addition, take from the debtor after acquired earnings which were neither a part of his bankrupt estate nor a part of earnings which he agreed to pay to them under any plan approved by them or by the court.

Obviously, the statement of the court of which petitioner complains, that the money paid to respondent was debtor's own money to do with as he saw fit, is correct whether petitioner is right or wrong in his contention that money in the hands of a disbursing agent under an approved plan belongs to the creditors in the event the plan fails. That is a question which can be determined when it arises in a proceeding where it is involved.

(b) The Decision of the Circuit Court Is Not in Conflict With Decisions of Other Circuits.

The date of filing of the original petition by the debtor under Chapter XI for an arrangement with his creditors furnishes the line of cleavage just as the filing of an ordinary petition in bankruptcy and an adjudication thereon. (B. A. Sec. 312, Subd. 3; 341, 352.) Earnings of the debtor from personal services after an adjudication are not part of the bankrupt's estate and the bankruptcy court acquires no jurisdiction over them. (*Local Loan Co. v. Hunt*, 292 U. S. 234, 78 L. Ed. 1230, 24 A.B.R. (N.S.) 668; *In re Liebowitt* (C.C.A.2), 93 F. (2d) 333, 35 A.B.R. (N.S.) 446; *Seaboard Small Loan Corp. v. Ottinger* (C.C.A.4), 50 F. (2d) 856, 18 A.B.R. (N.S.) 500; *Brouwer v. Superior Court*, 130 Cal. App. 163.) There is no provision in the law for the deposit of future earnings with the bankruptcy court, and the bankruptcy court could have no jurisdiction over funds deposited by Mr. Barrymore. Clearly, when Mr. Barrymore filed his petition and as a concommitant part thereof voluntarily paid to a receiver his earnings and was granted a drawing account of $1,000 a week, it amounted to Mr. Barrymore paying in his future earnings only upon condition he receive the $1,000 per week ordered by the court. As indicated by the Circuit Court, to all practical purposes, he reserved $1,000 a week and paid the balance to the receiver. Jurisdiction, if any existed, depended entirely upon the voluntary concession and acquiescence of Mr. Barrymore and only to the extent of that acquiescence. To hold that the court had jurisdiction over future earnings of a debtor subsequent to the filing of his petition would offend the spirit and purpose of the bankruptcy act to the undesirable oppression of debtors, a situation against which the courts in the cases above cited were careful to

guard. In *McKeever v. Local Finance Co.* (C.C.A. 5) 80 F. (2d) 449, a proceeding involving jurisdiction over earnings where an arrangement had been approved, it was held that future earnings of a debtor are not property over which the court had jurisdiction, and that the extension agreement was merely a device or plan by which, so long as the debtor was willing to carry it out, part of his earnings could be paid over and made available for the discharge of his debts.

Petitioner contends that in holding that the bankruptcy court did not have jurisdiction to require respondent (who had been the recipient of certain of his future earnings) to pay such funds over to the court for the benefit of debtor's creditors, the decision of the Circuit Court of Appeals is in conflict with *Hotel Governor Clinton v. Knott,* (C.C.A. 2), 120 F. (2d) 149. However, the facts of the two cases are fundamentally and entirely different, and because of that, the case is not in point.

It is clearly distinguishable from the case at bar on the following grounds:

1. The *Governor Clinton* case was at all times only concerned with income from the property of the debtor *owned by it at the time of the filing of the petition in bankruptcy,* while here we are dealing with the debtor's personal earnings from personal services, earned *after the commencement of bankruptcy.* This is a vital distinction, as appears from the authorities we cited relative to the principle that the date of the filing of the bankruptcy petition furnishes a line of cleavage between the "old" and the "new" order.

2. In the *Governor Clinton* case, the debtor was a "debtor in possession," with the same fiduciary duties as

those of a receiver or a trustee in bankruptcy (B. A., Sec. 188; *Urban Properties Corp. v. Benson*, C. C. A. 9, 45 A. B. R. (N. S.) 51, 116 F. (2d) 34), while here we are dealing only with a simple debtor for whose estate a receiver had been appointed. Mr. Barrymore did not have any fiduciary obligations to the estate, and his attorney was in a similar position. When Mr. Woolley became one of the debtor's attorneys in the debtor proceeding, the only fiduciary relation he assumed was one with the debtor personally. His job was to assist the debtor to perform his duties under the Bankruptcy Act and to secure, if possible, a suitable arrangement with his creditors. Mr. Wooley as attorney for Mr. Barrymore in the divorce proceedings had no duty, fiduciary or otherwise, to the bankruptcy court beyond the usual duties of an attorney as an officer of the court. The debtor was an independent agent and did not have the duties and obligations of a debtor in possession whose position is analogous to that of a receiver or a trustee in bankruptcy. *(In re Urban Properties Corp., supra.)*

3. In the *Governor Clinton* case, the court made an order for compensation to the operating company to be paid out of debtor's assets, without knowing that the operating company and the officers of the court had a secret agreement for the division of the operating fee. If the court in the *Governor Clinton* case had known of the existence of this secret agreement, a different order would have been made allowing a smaller compensation to the operating company.

In the case at bar, none of these facts existed. The order allowing Mr. Barrymore $1,000 per week *drawing account* was made months *before Mr. Woolley came into the case* and months before the divorce complaint was

filed or the contract for the divorce fee was entered into, and the payment of it was not made from the assets turned over upon the filing of the petition.

The other cases cited by petitioner fall into the same category as the Hotel Governor Clinton case. They all involve property of the bankrupt estate.

Petitioner cites the case of *In re Breinig*, 40 F. Supp. 29, in support of his contention that the court had jurisdiction over the future earnings reserved by the debtor, and also over the fees for services rendered to Mr. Barrymore in the divorce suit. This District Court decision supports neither claim. That case involved jurisdiction over property of the bankrupt owned by him when the petition was filed and also involved a debtor in possession. The services of the attorneys in that case were performed in the bankruptcy court.

(c) The Opinion of the Circuit Court of Appeals Does Not Go Into the Question of Whether the District Court Is or Is Not Bound by the Findings of the Referee and Hence the Argument in That Connection Cannot Possibly Furnish Grounds for the Granting of a Writ of Certiorari Herein.

It is, of course, elementary that the sufficiency of evidence to support findings will not constitute grounds for the granting of a writ of *certiorari*. The question of whether or not a district judge is or is not bound by the findings of the referee is not determined by the Circuit Court and, hence, the Circuit Court has not decided a federal question not theretofore determined nor decided one contrary to other decisions.

However, considering briefly the contention of the petitioner that, because a referee is in a better position to judge the credibility of witnesses, the findings of the ref-

eree are conclusive, it must be borne in mind that all of the evidence in this case, with the exception of certain oral testimony, which had no pertinency to the allegations of the petition, *consisted of typewritten transcripts of all hearings before the referee while Mr. Woolley was attorney for the debtor.* Thus, except as to the latter matter, there can be no disagreement as to exactly what transpired. As a result, we need not be concerned in this proceeding with the question whether the district judge is bound by the findings of a referee made on a controverted question of fact. Where no question of credibiilty of witnesses is involved and the matter is heard upon a typewritten transcript, it seems apparent that the rule set forth in *Carr v. Southern Pacific Company,* (C. A. A. 9) 128 F. (2d) 764, is applicable. In that case the Circuit Court stated as follows:

> "It should be noted that the appellant claims that the findings of the referee were made on a controverted question of fact, and hence, cannot be disturbed. This is not the fact or the law. The statement in our decision *In re Eastern Oil Co.* (C. C. A., 9th Cir.), 38 Am. B. R. (N. S.) 607, 608, 100 F. (2d) 341, 342, that 'It is conceded by all parties * * * that "the findings of the referee upon controverted facts will not be disturbed",' is relied upon to support this claim. This court cited our decision in *Weisstein Bros. & Survol v. Laugharn* (C. C. A. 9th Cir.), 38 Am. B. R. (N. S.) 540, 80 F. (2d) 419, where the rule with reference to the power of the court is more fully stated. It was unnecessary in the Eastern Oil Company case to discuss or consider the matter, in view of the concurrence of the parties in the rule as stated. However, the rule relied upon has no application for in the case at bar no question of credibility of witnesses appearing before the ref-

eree is involved. *On the contrary, the parties agree as to exactly what occurred and what was said, differing only as to the effect of the language used.* The district judge and the judges of this court are in as good a position to interpret such language as was the referee. *Stewart v. Geney* (C. C. A., 5th Cir.), 44 Am. B. R. (N. S.) 199, 116 F. (2d) 1010, 1012."

As stated by petitioner after the matter was submitted, it was reopened at the request of the receiver at which time there was testimony concerning bills of the debtor alleged not to have been paid by Mr. Woolley from funds he was handling for the debtor. The debtor's former attorneys, Scott and Risse, had maintained the practice of depositing Barrymore's drawing account funds in a trust account and paying his bills from that account. Mr. Barrymore suggested that Mr. Woolley follow the same procedure, and the balance of the Scott-Risse trust account was turned over to Mr. Barrymore and then to Mr. Woolley. The referee found that two bills, known as the Kersten and Durando bills, were not paid by Mr. Woolley. He did not find, as would be inferred from petitioner's brief, that Barrymore's bills remained unpaid. The District Court found that Mr. Woolley paid all bills from the trust account which Mr. Barrymore directed or authorized be paid, without delay and made no payment except upon the direct authorization of Mr. Barrymore. [Finding X, Rec. p. 352.]

A most cursory examination of the pleadings will show that payment or non-payment of the bills of debtor by Mr. Woolley was in no wise an issue in the proceeding.

In the amended petition on which the matter proceeded, it is alleged that respondent caused Mr. Barrymore to pay him out of funds which he had earned since the debtor proceedings, $5,950 in the divorce matter, together with certain other fees; that a contract had been entered into between respondent and Mr. Barrymore for the payment of $10,000 for services in the divorce matter; that this contract had not been approved by the court, and that the court had no knowledge thereof; that the court was not informed of the fact that payments were made to respondent from the drawing account, and that the allowances to Mr. Barrymore had been made upon the representation that the amounts allowed were necessary for petitioner's maintenance. In the prayer it was requested that the amounts so received be repaid to the Receiver. [Rec. pp. 28-9.] Thus, it will be seen that no issue was raised as to the payment or non-payment of the bills. That the Referee's findings in respect to these bills was beyond the issues, is demonstrated also by a perusal of the conclusions of law and order of the Referee. [Rec. pp. 110-112.] In neither is there any further reference to the Finding XIII in respect to the bills, nor is the order in anywise predicated thereon.

The pertinent evidence having been submitted upon typewritten transcripts, the rule of the Carr case, *supra*, is clearly applicable and neither the district judge nor the judges of the Circuit Court were bound to determine the case in accordance with the findings of the Referee.

(d) The Contract Between the Debtor and Mr. Woolley Did Not Require the Approval of the Referee.

Petitioner herein contends that the contract between Mr. Woolley and the debtor for services to be rendered by Mr. Woolley to the debtor in connection with the divorce proceedings was a void contract and that in order for it to be of binding effect it had to have the approval of the referee in bankruptcy.

We do not question the decisions in the cases cited by counsel on pages 51 to 56 of his brief. It is unquestionably the law that, as held in those cases, a debtor is without authority to contract concerning property becoming a part of the bankrupt's estate upon the filing of his petition. It is no doubt further true that, as therein held, the bankruptcy court has exclusive jurisdiction over such property. However, there is no connection between such points of law and this case. Petitioner does not intimate that the debtor was a bankrupt in possession nor that any part of the money paid over by Mr. Barrymore to respondent was property of the debtor at the time of the filing of his petition. No cases of which counsel have knowledge, nor any cited by petitioner, hold that the bankruptcy court has jurisdiction over the property of the debtor earned and acquired by him subsequent to the filing of his petition, nor that it can control the bankrupt's contracts unrelated to previously owned property and require its authorization before they are entered into. Section 312 of the Bankruptcy Act provides that the jurisdiction and powers of the court in proceedings under Chapter XI shall be the same as in the case of an involuntary petition

for adjudication, and it has never been questioned to our knowledge but that after the filing of his petition, a debtor is free to contract concerning after acquired property in such manner as he may see fit. Such authority is not taken from him by Section 311 cited by petitioner. It is clearly stated in that section that the court shall have exclusive jurisdiction of the debtor and his property "for the purposes of this chapter." Contentions of counsel for petitioner seem to arise from a curious conception of Chapter XI proceedings in that he seems to assume that a debtor filing a petition under Chapter XI becomes, in effect, the slave of the creditors whose subsequent control over him and his future earnings through the bankruptcy court is absolute. Luckily, and properly so, no such jurisdiction is provided by the terms of the Act.

Conclusion.

It is respectfully submitted that no grounds for the granting of a writ of certiorari herein have been shown by the petitioner.

Respectfully submitted,

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